

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

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GOLDEN BETHUNE-HILL, et al. : Civil Action No.  
vs. : 3:14CV852  
VIRGINIA STATE BOARD OF : May 14, 2015  
ELECTIONS, et al. :  
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COMPLETE TRANSCRIPT OF THE CONFERENCE CALL  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURT: Hello. Are you all there?

UNIDENTIFIED SPEAKER: Yes, sir, Your Honor.

THE COURT: All right, this is Bethune-Hill against the Virginia State Board of Elections and the Virginia House of Delegates, 3:14CV852. If you'd identify yourself for the record and the party whom you represent, and if you'd give your name whenever you speak so the court reporter can record it, I would appreciate it. Go ahead. Plaintiff?

MR. SPIVA: Your Honor, this is Bruce Spiva from Perkins Coie for the plaintiffs.

MR. TROY: Your Honor, Tony Troy along with Dan Glass, Godfrey Pinn, and Jeff Brundage on behalf of the defendants State Board of Elections and Department of Elections.

MR. BRADEN: Your Honor, it's Mark Braden at Baker & Hostetler for defendant intervenors, the House of Delegates.

THE COURT: All right. Why are we having this call, folks?

MR. TROY: Judge, this is Tony Troy. Approximately a week ago, I had informed Mr. Braden that we were not going to be adverse to the position of

1 intervening defendants, but we had determined not to  
2 present as a testifying expert Dr. Katz. He is going to  
3 be a nontestifying expert. Mr. Braden, notwithstanding,  
4 issued two subpoenas, the latest on Dr. Katz to give  
5 testimony in California.

6 We object on the grounds that as indicated, we  
7 are not presenting Dr. Katz or testimony in front of the  
8 Court, but we believe it clear that under the --

9 THE COURT: Mr. Troy, I don't know what it is,  
10 but you're coming across with a great deal of static, and  
11 I'm having trouble hearing you, and the court reporter  
12 can't make it out. You are sort of losing a lot of words.  
13 Are you on a squawk box somewhere?

14 MR. TROY: Let me try it this way, Judge. Hold  
15 on. Is this better?

16 THE COURT: Yes. So go back again and start  
17 again.

18 MR. TROY: I will. Yes, sir. I'm sorry. I'm in  
19 a car, Judge. Your Honor, as indicated, approximately --  
20 sometime last week, I informed Mr. Braden that we had  
21 determined not to present as a testifying expert Dr. Katz.  
22 We are holding him as a nontestifying expert which, of  
23 course, under the rules, depositions of nontestifying  
24 experts are not allowed. We are not presenting Dr. Katz  
25 as an expert at trial.

1 THE COURT: Are you presenting any experts?

2 MR. TROY: We are not, Judge.

3

4 (Brief interruption.)

5

6 THE COURT: Hello. Are you all there?

7 UNIDENTIFIED SPEAKER: Yes, Your Honor.

8 THE COURT: Okay. Well, the Katzenjammer Kids

9 are here, too. So -- I'm going on a new telephone

10 technique right now called hands-off. See if we can keep

11 this from happening again.

12 Mr. Troy, you are not using Dr. Katz, you're not

13 calling anybody, and somebody wants to depose him. Who

14 has moved to depose him?

15 MR. TROY: Your Honor, Baker Hostetler,

16 representing the defendant intervenors, issued a subpoena

17 for Dr. Katz in California, and obviously we object to

18 California, but we object to trying to depose a

19 nontestifying expert that we are not going to be

20 presenting at trial.

21 Let me clarify one other matter, Judge, so that

22 everything is in context, and I'll be brief. As Your

23 Honor knows, this case involves a challenge to 12 House of

24 Delegates districts. The House of Delegates and the

25 speaker have intervened to defend those districts.

1           We represent two state agencies that simply  
2   implement elections. Our clients, our agencies, have no  
3   substantive role in trying to draw or determine the  
4   propriety of districts. Consequently, we are ready, our  
5   clients, to implement such election as required either by  
6   law or court order, but we don't believe that it's  
7   necessary for taxpayer money to be spent substantively  
8   beyond that when Mr. Braden and his firm are fully capable  
9   and well capable of defending the constitutionality of the  
10   districts.

11           So we're going to have a limited role now in  
12   representing solely our agencies and do not need -- aren't  
13   going to present witnesses, and, consequently, that's  
14   another reason why we are objecting to our expert being  
15   called.

16           THE COURT: You mean, Mr. Troy, you're not going  
17   to defend the constitutionality of the extant map?

18           MR. TROY: We believe that to be valid and  
19   constitutional, but Mr. Braden, on behalf of the House of  
20   Delegates, is fully capable and is fully defending the  
21   districts. I think he would agree that his fees are being  
22   paid by Virginia taxpayers. We respectfully, Your Honor,  
23   don't believe that they have to pay our firm in addition.

24           THE COURT: But I guess my question is, are you  
25   going to be actively defending the current configuration,

1 the current map?

2 MR. TROY: We will not be presenting expert  
3 testimony or witnesses on that, Your Honor.

4 THE COURT: Will you be presenting any brief on  
5 the topic once other evidence is presented?

6 MR. TROY: We'll have to cross that when it comes  
7 to that. Most likely not, but, you know, I will have to  
8 see what the others are saying, but I would not be taking  
9 this position but for the fact of having full confidence  
10 in both parties, knowing that the Court will have before  
11 it all aspects of challenging and upholding the existing  
12 districts.

13 THE COURT: All right. This is a strange posture  
14 for the case, Mr. Troy. I'll have to reflect on it.

15 MR. TROY: Well, in a sense, Your Honor, but,  
16 obviously, it's not quite but somewhat analogous to the  
17 Page case where intervenors are fully defending the  
18 validity of the third Congressional district.

19 THE COURT: But that's because the Attorney  
20 General's Office is occupied by someone who is taking a  
21 different view of the law politically, and the parties  
22 have changed, and so the attorney general is hewing to the  
23 party line. That's what's happening in that case.

24 MR. TROY: I understand, Judge.

25 THE COURT: And you're not in the Attorney

1 General's Office. And the governor doesn't have anything  
2 to do with the Virginia State Board of Elections as I  
3 understand it.

4 MR. TROY: He does appoint the members of the  
5 state board --

6 THE COURT: Right, but he doesn't have anything  
7 to do with their functioning, does he, constitutionally  
8 once they're appointed?

9 MR. TROY: He appoints the members, and they  
10 operate pursuant to statute; yes, Your Honor.

11 THE COURT: So they can make their own decision  
12 about whether they're going to defend it wholly apart from  
13 the governor and the attorney general; is that right?

14 MR. TROY: That is correct, Your Honor.

15 THE COURT: And you are telling me basically  
16 today that the board has decided they're not going to  
17 defend the map.

18 MR. TROY: Well, Your Honor, I will say that a  
19 decision has been made and communicated to me that if I  
20 believe, and I do, that both sides are going to be  
21 zealously advocated and presented to the Court, that there  
22 is no need for taxpayer money to be spent to the extent it  
23 would necessarily have to be spent to present two  
24 arguments mirroring each other as to the validity of the  
25 districts.



1 THE COURT: All right. I understand. I'm not  
2 sure where that leaves us, but I understand your position.  
3 All right, Mr. Braden, you want to take the deposition of  
4 Mr. Katz; is that correct?

5 MR. BRADEN: Yes, Your Honor, we do, and I'd like  
6 to explain what our rationale is. I think if we have just  
7 a couple minutes, I could lay out a timeline and explain  
8 why we think it is vital for Dr. Katz to be deposed.

9 At the beginning of this case, it was expressed  
10 by counsel for the defendants that they believed the plan  
11 to be constitutional and that they would vigorously and  
12 zealously defend that constitutionality.

13 THE COURT: Yes.

14 MR. BRADEN: On March 18th, Dr. Katz was  
15 identified by the defendants as a testifying witness.

16 THE COURT: He was actually identified as a  
17 testifying witness?

18 MR. BRADEN: Yes.

19 THE COURT: All right.

20 MR. BRADEN: On April 10th, he filed a report,  
21 his expert report which was provided to the plaintiffs and  
22 the defendant intervenors. When Dr. Katz was announced to  
23 us as the expert witness -- he has a very well-known  
24 reputation as to what he does. He's one of the most  
25 prominent political scientists and expert witnesses in the

1 country. I've used him, I believe the plaintiff's counsel  
2 in this case has used him as an expert witness in other  
3 voting rights cases.

4 We knew exactly what he would do his report on,  
5 and we had instructed our witnesses that they did not need  
6 to duplicate his report and they should narrow their  
7 report down to areas that would be different in substance  
8 from what Dr. Katz would be likely to do.

9 Last month, we had an agreement between all the  
10 parties in this case that Dr. Katz would be produced for a  
11 deposition on May 20th. I'll have to tell you, given all  
12 the depositions in this case and all the parties, there  
13 was a lot of maneuvering around, but it took us quite a  
14 while to get a date. There was agreement among all  
15 parties that would be.

16 We received, last Friday at 9:00 p.m., an email  
17 cancelling Dr. Katz' appearance on May 20th for the  
18 deposition. We then issued a subpoena for him, I think it  
19 was Monday or Tuesday. I don't remember what day we got  
20 it done. We sent a subpoena to him, and then we received  
21 the objections from defendant counsel on three bases.

22 He said that it seeks privileged testimony of  
23 information from a consulting expert for another party. I  
24 think that's foolishness, because principally what we want  
25 to do is if we don't get him as a live expert, we want him

1 to validate his report so we can submit it as evidence.  
2 So I can't imagine how one could argue it's privileged  
3 testimony when it's an expert report that's been provided  
4 to all the parties, and we're talking about information  
5 when he was functioning as an expert testifying witness.

6 The other two points they made, frankly, were  
7 valid. That is we were requesting a deposition more than  
8 100 miles from Dr. Katz' home, and we had only given him  
9 five business days' notice to come to Washington. We were  
10 attempting to subpoena him on the same day they had agreed  
11 to, but in light of their objections to that, we went to  
12 California and have issued a subpoena from the Central  
13 District of California, U.S. District Court, for a  
14 deposition on May 22nd.

15 Frankly, the only thing we want to do is, if the  
16 defendant won't permit us to use Dr. Katz as a testifying  
17 witness and won't permit him to testify, which is what  
18 they're telling us, then we simply want him to validate  
19 his report so we can submit it as evidence to this Court  
20 and give the opportunity to the plaintiffs to depose him.

21 This report and Dr. Katz has available  
22 significant relevant information on which this Court can  
23 improve its judgment in its decision-making on this  
24 matter.

25 THE COURT: Have you offered to pay Dr. Katz his

1 fees to testify?

2 MR. BRADEN: Absolutely. We'll pay travel and  
3 expenses to testify.

4 THE COURT: I mean not in his deposition but at  
5 trial as your expert.

6 MR. BRADEN: Yes. The answer to that is yes.

7 THE COURT: And what reason was given that Dr.  
8 Katz can't be used by you now, by the defendants?

9 MR. BRADEN: Their only response to that is he's  
10 now their consulting expert.

11 THE COURT: Consulting on what? They're not  
12 going to do anything.

13 MR. BRADEN: That was our question, Your Honor.

14 THE COURT: Well, I don't really understand the  
15 position of the defendants in the case, but have you said  
16 all you want to say right now, Mr. Braden?

17 MR. BRADEN: Yes, I have, Your Honor.

18 THE COURT: All right. Who is here for the  
19 plaintiff?

20 MR. SPIVA: Bruce Spiva, Your Honor.

21 THE COURT: Mr. Spiva, do you have anything to  
22 say?

23 MR. SPIVA: Not much, Your Honor. I would just  
24 note that the intervenors have named two experts even  
25 though, as I understand it, I think the standing order

1 limits each party to one expert in a given field, and so  
2 what they're really asking for now is three experts, you  
3 know. I guess they could have cross named Dr. Katz to  
4 begin with, so we don't see a need for it, but this is  
5 really between, I think, the state and the intervenors,  
6 Your Honor.

7 THE COURT: All right.

8 MR. TROY: Your Honor, this is Tony Troy again.  
9 Just a few matters. One, Mr. Braden neglects to mention  
10 that over a week ago, I did sit down orally and informed  
11 him of what we were doing with our expert.

12 Secondly, I have heard for the first time now  
13 that their expert testimony was structured on what they  
14 anticipated that Dr. Katz may or may not say. You know,  
15 I'm sorry that that's the way they structured their  
16 testimony, but Dr. Katz was not and is not their expert.  
17 And this Court of the district, especially, Your Honor,  
18 the case of -- if Your Honor will bear with me one  
19 second --

20 UNIDENTIFIED SPEAKER: N5 Technologies.

21 THE COURT: Who is this? Somebody is on the  
22 phone?

23 MR. TROY: This is me, Judge. N5 Technologies,  
24 and it's a decision by Judge Ellis dated January 30th of  
25 2014. In a similar situation, he pointed out that under

1 the rules, 26(b)(4)(D), nontestifying experts are not  
2 subject to depositions, and in an instance where the  
3 plaintiff -- the defendant has withdrawn a testifying  
4 expert and is not presenting them, Judge Ellis ruled, in  
5 short, that the plaintiff -- in that case, plaintiff  
6 cannot compel at trial the testimony of an expert retained  
7 and designated by defendants.

8 Well, we have an expert that we retained and  
9 designated but now, for the reasons stated, are not  
10 presenting as a testifying expert. He is a nontestifying  
11 expert, and if there's a remedial stage to this, should  
12 that ever occur, we will want Dr. Katz available to us.

13 So he was our expert, he is our expert, and under  
14 the plain language of the rules cannot be deposed, and as  
15 Judge Ellis found, the plaintiff in that case, defendant  
16 intervenors in this case, cannot compel his testimony.

17 I'm sorry they tactically structured their  
18 expert's testimony on what they anticipated Dr. Katz may  
19 or may not be saying, but that's a tactic that they  
20 undertook at their own risk.

21 THE COURT: Mr. Troy, there's more here than  
22 meets the eye. In my judgment, this is a bizarre  
23 situation, and it may be that what Dr. Katz said no longer  
24 suits what the Board of Elections wants to do in the case  
25 given the political situation in the state, but apart from

1 that, this man was designated as a testifying expert, he's  
2 submitted a report, and all they want to do is get the  
3 report verified now.

4 Now, will you -- does anybody object to the  
5 report coming into evidence in lieu of the testimony of  
6 Dr. Katz at trial? Do you, Mr. Troy?

7 MR. TROY: Your Honor, I think the plaintiffs  
8 have more to say --

9 THE COURT: I didn't ask that question. I asked  
10 you if you had any objection.

11 MR. TROY: The report would be hearsay, Your  
12 Honor.

13 THE COURT: Do you have any objection to agreeing  
14 to let it come in over -- it's obviously hearsay. That  
15 was the reason I asked you if you have any objection. Do  
16 you object to it being entered into evidence?

17 MR. TROY: We do, Your Honor. And, Your Honor,  
18 let me clarify. I assure the Court that all we're  
19 attempting to do and all we've been told to do is to save  
20 taxpayer money, and if we believe, and we do, that Baker  
21 Hostetler and Mr. Braden are fully capable of defending  
22 the validity, then there's no need to duplicate effort and  
23 have the taxpayers pay twice. That's the end-all and  
24 be-all of our position. It is not political.

25 THE COURT: Well, there's a problem then with

1 where you've put the other side in the case. Once they  
2 receive a report from your guy, it's perfectly all right  
3 for them to rely on it, and they think you're going to  
4 testify. This is different than Judge Ellis's case. I'm  
5 familiar with it.

6 Here's what we're going to do: I'm going to  
7 allow -- this is a what, a motion to quash a subpoena? Is  
8 that what this is?

9 MR. TROY: In California, yes, sir.

10 THE COURT: Then you can move to quash it, and I  
11 believe that this Court as well as the other Court has the  
12 authority on it, to decide it. What is that rule?

13 MR. TROY: I forgot the rule, Judge, but you are  
14 correct.

15 THE COURT: You file a motion to quash the  
16 subpoena. You state your reasons, you brief in  
17 response -- Mr. Spiva, you are aligned in this situation,  
18 I suppose, as an adverse party, so I'll give you the right  
19 to file at the same time the intervenor defendants do, and  
20 then you can reply, Mr. Troy. Then we'll decide from  
21 there what we do.

22 In the meantime, my strong suggestion to you all  
23 is you sit down and sort this out so that the intervenor  
24 defendants are not deprived of the testimony of Dr. Katz,  
25 and if that simply means having him testify to what he's



1 already testified to in the report, I can't imagine why  
2 that's harmful to anybody. So let's set a schedule. How  
3 quickly can you file your motion to compel, Mr. Troy?

4 MR. TROY: Your Honor, I'm in Kentucky right now  
5 and back on Sunday. How is Wednesday?

6 THE COURT: Well, you are running -- Wednesday  
7 meaning what day?

8 MR. TROY: What would that be, the 20th?

9 THE COURT: I thought you said you were in  
10 Kentucky until the end of the week.

11 MR. TROY: I'm in Kentucky returning on Sunday,  
12 yes, sir.

13 THE COURT: File it on Wednesday, May 20th, by  
14 5:00 p.m. eastern daylight time.

15 MR. TROY: Yes, sir.

16 THE COURT: When do you want to file your  
17 response, Mr. Braden and Mr. Spiva?

18 MR. BRADEN: This is Mr. Braden. We can file the  
19 next day.

20 THE COURT: So you're going to file the 21st; is  
21 that what you said?

22 MR. BRADEN: Yes.

23 THE COURT: If this is resolved in your favor,  
24 you're going to have time to take his deposition no matter  
25 what the orders say in the case. You don't need to do

1 it -- what is the discovery cutoff in the case?

2 MR. BRADEN: The 22nd. That's the reason why --

3 THE COURT: If this is resolved in your favor,  
4 you're going to have time to deal with it.

5 MR. BRADEN: Okay. Then, Your Honor, we'd like  
6 to file it on the 22nd.

7 THE COURT: You file on the 22nd. And, Mr.  
8 Spiva, can you do the same?

9 MR. SPIVA: Yes, Your Honor.

10 THE COURT: All right. You file your reply  
11 brief, Mr. Troy, on the 25th, again by five o'clock.

12 MR. TROY: Yes, sir.

13 THE COURT: And if I need -- if we need argument,  
14 we'll deal with it. There ought to be a way for you all  
15 to agree and work this out, because the fact of the matter  
16 is, it looks to me as if the plaintiffs and other parties  
17 in the case have the right to rely on a report once filed.  
18 We'll have to go from there. Is Dr. Katz willing to  
19 testify if he's paid by the intervenor defendants? Do you  
20 know that, Mr. Braden?

21 MR. BRADEN: I am relatively -- unless the  
22 defendants ask him not to or block his testimony through  
23 some contractual arrangement or something, my  
24 understanding from Dr. Katz is he's willing to testify,  
25 yes.

1 THE COURT: All right. I guess you all want the  
2 transcript so that you can figure out what you are doing  
3 here; is that right?

4 MR. TROY: Yes.

5 MR. BRADEN: Yes.

6 THE COURT: Do you want it expedited given the  
7 briefing schedule?

8 UNIDENTIFIED SPEAKER: Yes, Your Honor if the  
9 Court please.

10 THE COURT: All right. Done. Thank you all very  
11 much.

12

13 (End of proceedings.)

14

15

16 I certify that the foregoing is a correct  
17 transcript from the record of proceedings in the  
18 above-entitled matter.

19

20

21 /s/  
22 P. E. Peterson, RPR

\_\_\_\_\_  
Date

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